(13)

No. 93-1636

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TOM SWINT, TONY SPRADLEY, DRUCILLA JAMES and JEROME LEWIS,
Petitioners,
v.
CHAMBERS COUNTY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT CHAMBERS COUNTY COMMISSION

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The United States Court of Appeals for the Eleventh Circuit did not exceed its authority when it chose to exercise "pendent appellate jurisdiction" to review the district court's denial of the County Commission's motion for summary judgment. Legal and practical considerations compel the conclusion that courts of appeals should have discretion to review nonappealable orders that are pendent to appealable "collateral orders," and this was certainly a circumstance where that discretion was properly exercised. The court resolved a purely legal issue that was ripe for review, was closely related to the other issues before the court, and had the potential to resolve *all* of the remaining claims against the County Commission.

Alternatively, the district court's order denying the County Commission's motion for summary judgment was itself an appealable "collateral order." In that motion, respondent argued that this case did not satisfy the prerequisites for municipal liability under section 1983 identified in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), because Sheriff Morgan lacked the legal authority to set actionable "policies" for the County Commission. Consistent with this Court's treatment of the appealability of orders rejecting other analogous defenses in section 1983 actions, respondent submits that the Court should also authorize interlocutory appeals from orders rejecting such legal arguments when presented by municipal defendants in section 1983 litigation.

I. COURTS OF APPEALS SHOULD HAVE THE POWER TO REACH "PENDENT" ISSUES IN COLLATERAL-ORDER APPEALS.

The Eleventh Circuit was faced with simultaneous pretrial appeals by three individual defendants and by two municipal defendants, respondent Chambers County Commission and the City of Wadley. The individual defendants, who included Sheriff Morgan, had the right to appeal from the denial of their motions claiming qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (concluding that denial of a qualified-immunity motion is an appealable collateral order). The municipalities were appealing from the denial of motions for summary judgment predicated on the legal argument that the individual defendants were not municipal "policymakers" under *Monell*. The Eleventh Circuit decided that this issue was not independently appealable, Pet. App. 29a-30a, but chose to exercise "pendent appellate jurisdiction" over the County Commission's appeal, *id. at* 30a-31a.[1]

[1] The court of appeals refused to entertain the City's appeal, concluding that the state of the record precluded a final determination whether the Chief of Police in Wadley has, in practice, final policymaking authority. Pet. App. 37a.

The decision to entertain the County Commission's appeal finds ample support in the case law in the Eleventh Circuit[2] and other circuits.[3] This Court, however, has not signalled a consistent approach to the permissible scope of appellate review in the collateral-order context. *Compare Abney v. United States*, 431 U.S. 651, 662-63 (1977) (collateral-order appeal of double jeopardy claim does not provide basis for pretrial review of sufficiency of indictment), *with Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974) (collateral-order appeal of order allocating costs of class-action notice permits consideration of decision to allow notice by publication). *See* Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 Yale L.J. 511, 518, 519

[2] *See Menuel v. City of Atlanta*, 25 F.3d 990, 995 n.7 (11th Cir. 1994); *Kelly v. Curtis*, 21 F.3d 1544, 1545 (11th Cir. 1994); *Schmelz v. Monroe County*, 954 F.2d 1540, 1543-44 (11th Cir. 1992); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir. 1990).

[3] Although some circuits limit pendent appellate jurisdiction to review of issues that are "inextricably intertwined" with an appealable issue, *see, e.g., Williams v. Commonwealth*, 24 F.3d 1526, 1542-43 (6th Cir.), *cert. denied*, 115 S. Ct. 358 (1994); *Brown v. Grabowski*, 922 F.2d 1097, 1106 n.3 (3d Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991), several others have joined the Eleventh Circuit in holding that they have discretion to reach pendent issues where there is substantial overlap with appealable issues and where a broader ruling will promote the resolution of the case, *see, e.g., San Filippo v. U.S. Trust Co. of New York*, 737 F.2d 246, 255 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985) (reaching the merits in a qualified-immunity appeal, because of the "waste of judicial resources" if suit were to go forward); *Akers v. Caperton*, 998 F.2d 220, 224 (4th Cir., 1993) (resolving constitutional claim because it was "substantially related to the [appealable] immunities issue and its resolution will advance this litigation"); *Robinson v. Volkswagenwerk AG*, 940 F.2d 1369, 1374 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1160 (1992) (setting forth factors guiding exercise of discretion).

(1990) (in *Eisen*, "the Court appeared to sanction the extension of collateral-order jurisdiction to pendent rulings"; in *Abney*, "however, the Court took a markedly different approach"). *See also* 16 C. Wright, A. Miller, E. Cooper, and E. Gressman, *Federal Practice and Procedure* § 3937, at 373 (*Abney* "should not be read to preclude consideration of noncollateral rulings when special circumstances suggest that this course would be desirable, and that there has been no attempt to abuse the collateral order appeal opportunity").[4] As explained more fully below, the Eleventh Circuit's exercise of pendent appellate jurisdiction in this case was fully consistent with this Court's treatment of the scope of appellate jurisdiction in analogous contexts, and also made a great deal of sense.

A. The Power to Exercise Pendent Appellate Jurisdiction Is Well Recognized in a Broad Range of Contexts.

This Court has previously noted that the statutes governing appellate jurisdiction, such as 28 U.S.C. § 1291, are to be construed in light of their "object of efficient administration of justice in the federal courts." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1996 (1994); *see* 9 J. Moore, *Moore's Federal Practice* § 110 (noting that section 1291 "has been liberally construed"); *cf.* Fed. R. Civ. P. 1 (civil rules "shall be construed and administered to secure the just, speedy,

[4] As petitioners point out, Supp. Br. at 6-7, *Chicago R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), is another relevant precedent. There, one party had appealed the dismissal of its complaint. In a consolidated case that had been removed from state court, the opposing party simultaneously appealed the denial of its motion to remand. Although recognizing that denial of a motion to remand is not independently appealable, *id.* at 578, the Court held that the court of appeals properly reached that issue on the basis of the pending appeal filed in the other case by the opposing party, which apparently was based (like collateral-order appeals) on 28 U.S.C. § 1291, *id.*

and inexpensive determination of every action"). The principal policy concern underlying the "finality" requirement of section 1291 is Congress's desire to avoid "piecemeal litigation." *E.g., Catlin v. United States*, 324 U.S. 229, 233-234 (1945). That concern justifies careful limitations on the categories of orders that may form the basis of interlocutory appeals. *See Digital Equipment Corp., supra.* Where such an appeal has been properly filed, however, the *same* concern argues in *favor* of granting appellate tribunals the power to resolve related issues that might otherwise require a later appeal. Thus, in a broad range of contexts, this Court has consistently held that the courts of appeals have discretion to consider "pendent" legal issues, even if those issues, by themselves, could not have formed an independent basis for appellate jurisdiction.

For example, it is well established that the courts of appeals, when reviewing preliminary injunctions under 28 U.S.C. § 1292(a)(1), are not confined to considering the propriety of the injunctions themselves. To the contrary, "[j]urisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *supra*, § 3921, at 17. As Judge Friendly put the matter, "when, as here, the district court has granted a temporary injunction so that the court of appeals has unquestioned jurisdiction of the cause, it would be absurd to require the court to close its eyes to another interlocutory order which, though not itself appealable, might infect the entire proceeding with error and thus require reversal after the large expenditure of judicial and professional time." *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1201 (2d Cir. 1970) (reviewing the district court's refusal to stay proceedings).

Thus, this Court has held that it can be appropriate, in an appeal from the grant or refusal of preliminary injunctive relief, for the court of appeals to proceed to decide the case on the merits. *See Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 757 (1986). Although the Court in *Thornburgh* recognized that courts of appeals would ordinarily review only the injunction itself in such cases, the Court made clear that this was "a rule of orderly judicial administration, not a limit on judicial power." *Id.* Where "a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance," the court of appeals may address any issue under its plenary scope of review. *Id. See also Deckert v. Independence Shares Corp.,* 311 U.S. 282, 287 (1940) (approving review of order denying motion to dismiss in connection with appeal from separate order granting preliminary injunction).

The Court has adopted a similarly broad interpretation of the jurisdictional statute at issue here—section 1291—in its usual application involving appeals after final judgment has been entered. In that setting, the Court has authorized appellate consideration of almost any interlocutory order previously entered by the district court, even those that were entirely separate from the merits of the "final decision" that formed the basis of the appeal. *See* 15A C. Wright, A. Miller & E. Cooper, *supra,* § 3905.1, at 250 & n. 3 (citing cases).

Another example is the scope of review available to a court of appeals that has jurisdiction to consider one particular action of a district court on a petition for a writ of mandamus. In such a case, this Court has authorized a court of appeals, in order to avoid "piecemeal litigation," to go on and consider related issues that could not themselves have been brought to the court through mandamus. *Schlagenhauf v. Holder,* 379 U.S. 104, 111 (1964); *see Southern Pacific Transp. Co. v. San Antonio,*

748 F.2d 266, 270 (5th Cir. 1984) (where case came to court on petition for a writ of mandamus challenging a stay of execution of judgment, court of appeals had power to address related issues that "may not independently be grounds for mandamus"). Wright and Miller offer the following explanation of the practical considerations that underlie the *Schlagenhauf* rule:

> [T]he determination that the scope of mandamus review might properly be extended to related questions that would not independently support such review seems entirely appropriate. All of the damage that may be done by mandamus procedure has been realized once the question of power is brought before the court of appeals. If closely related matters can be determined without additional delay, burden on the parties or the courts, or expansion beyond the powers a court of appeals might exercise on other methods of review, they are better determined on the petition.

16 C. Wright, A. Miller, E. Cooper & E. Gressman, *supra,* § 3934, at 232.

Finally, the Court has applied the same practical construction when determining the scope of its own powers of review in cases brought here on writs of certiorari. Although the usual rule is that the Court will not review issues that are not raised in the petition for certiorari, the Court has reserved the power to address any other issue it discerns in the record of the case. *Wood v. Georgia,* 450 U.S. 261, 264 n.5 (1981); *Vance v. Terrazas,* 444 U.S. 252, 258 n.5 (1980) ("consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented [below] is not beyond our power, and in appropriate circumstances we have addressed them"); *see also* S. Ct. Rule 24.1(a) ("At its option, . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.").

Thus, if the Court were to conclude that review, in collateral-order appeals, is categorically limited to the merits of the specific order on appeal, and that courts of appeals lack discretion to consider related issues even where doing so would plainly expedite the orderly resolution of the case, such a rule would stand out as exceptional. For the reasons stated in the next section, we do not believe that such an exceptional rule is justified.

B. The Courts of Appeals Should Have Equivalent Discretion in Collateral-Order Appeals.

In deciding whether Congress intended to allow courts of appeals to exercise pendent appellate jurisdiction in collateral-order cases, it is of course appropriate to begin with the statute itself. Section 1291, however, provides no real guidance, since it does not address the *scope* of review in appeals from "final decisions." The fairest conclusion is that Congress left it up to the courts to determine the appropriate scope of review, where an appeal has been properly filed.[5] The statutory language provides no basis for drawing a distinction, in terms of the scope of review, between collateral-order appeals, on the one hand, and other appeals under section 1291 or injunctive appeals under section 1292(a)(1), on the other.[6] Nor

[5] As a general matter, it should not be assumed that Congress intended a strict construction of the statutes establishing the jurisdiction of the courts of appeals, in view of the fact that it simultaneously granted this Court the power, by rule, to authorize an appeal of any "interlocutory decision . . . that is not otherwise provided for." 28 U.S.C. § 1292(e). Congress has also expressly conferred power on this Court to define the word "final" in section 1291 by rule. *See* 28 U.S.C. § 2072.

[6] Section 1291 grants jurisdiction over "appeals from all final decisions of the district courts," without addressing whether review is limited to the merits of such "final decisions." Section 1292(a)(1) grants jurisdiction over appeals from "interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions," without addressing whether review is limited to such orders.

is there any apparent basis in the statute's language for rejecting the concept of "pendent jurisdiction" in the appellate context, while accepting the same concept in the interpretation of the statutes granting jurisdiction to the federal *district* courts. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).[7]

Because the statute does not preclude pendent appellate jurisdiction in collateral-order appeals, this Court can and should opt in favor of allowing courts of appeals to exercise that power. The "same practical considerations for avoiding piecemeal appeals that underlie the final order doctrine instruct that when an appeal is otherwise warranted on a single issue, we may review all issues that the parties raise and which are reasonably related when that review will advance the litigation or avoid further appeals." *O'Bar v. Pinion*, 953 F.2d 74, 80 (4th Cir. 1991). Just as in the injunctive appeal context, if there is an important but nonappealable issue that is ready for review when a collateral order is appealed, a decision to review that issue can sometimes produce enormous savings in time and judicial resources. *See Schmelz v. Monroe County*, 954 F.2d 1540, 1542-43 (11th Cir. 1992) (citing "concerns for judicial economy"); *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 255 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985). There would be no justification for requiring the courts of appeals, in this one category of appeals, to stay their hand even when it is apparent that they are remanding a case for lengthy additional proceedings that will be a complete waste of time because of a previous error committed by the district court.

[7] As noted, the Eleventh Circuit in this case treated the appeal of one party, the Chambers County Commission, as "pendent" to the authorized interlocutory appeal of another party, Sheriff Morgan. In this regard, it is noteworthy that Congress, when it codified the rules of pendent jurisdiction for federal district courts, specifically endorsed "pendent party jurisdiction." *See* 28 U.S.C. § 1367(a) ("Such supplemental jurisdiction shall include claims that involve joinder or intervention of additional parties.").

Certainly such a restrictive approach cannot be defended on the theory that allowing pendent appellate jurisdiction in the collateral-order context will do more systemic harm than good. None of the arguments against allowing courts of appeals to have this power retains any force if courts will exercise appropriate *discretion* in deciding whether to exercise pendent jurisdiction in each case.

First, courts of appeals must be sensitive to the same policy concern that has led this Court to limit interlocutory appeals—the need to minimize "piecemeal appeals." *See, e.g., Digital Equipment Corp.*, 114 S. Ct. at 1998. But this concern is not very compelling here, where the issue is whether to broaden the scope of an interlocutory appeal that has *already* been filed. In most instances, if a collateral-order appeal is already being pursued in a case, addressing "pendent" issues will not increase the disruptive effects of the appeal. In any event, where a pendent appeal is likely to add to the disruption caused by a collateral-order appeal, the court of appeals may decide, in its discretion, not to hear or decide the pendent issue.

A more specific concern in this context is the one expressed in *Abney*, *supra*—that a rule allowing pendent appeals "would encourage criminal defendants to seek review of, or assert, frivolous [collateral-order] claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to" trial. 431 U.S. at 663. But, here again, the discretionary nature of pendent appellate jurisdiction alleviates this concern. Courts of appeals should refuse to address any "pendent" issues except in those cases where the appellant has mounted at least a substantial legal challenge to the appealable collateral order that is supplying the court's appellate jurisdiction. Indeed, that is precisely the rule applied when district courts are deciding whether to exercise pendent jurisdiction of state-law claims. *See United Mine Workers*, 383 U.S. at 726-27; *see also* 28

U.S.C. § 1367(c)(2) (allowing district courts to dismiss pendent state claims if "the [state] claim substantially predominates over the claim or claims over which the district court has original jurisdiction").

Finally, any concern that courts of appeals will reach issues prematurely, in the absence of an adequate record, can also be handled through the exercise of appropriate discretion. Just as in the injunctive-appeal context, *see Thornburgh*, 476 U.S. at 757, the courts of appeals should only address pendent issues in collateral-order appeals when there is no potential dispute about the relevant facts. In the absence of such a dispute, they are in as good a position to decide the issue in the current appeal as they would be in a later appeal.

As these arguments suggest, the appropriate use of pendent appellate jurisdiction in the collateral-order context is likely to be relatively rare. The courts of appeals can and should be reticent about deciding issues beyond the merits of the appealable collateral order itself. And experience, in those circuits that have been most receptive to the concept, teaches that the power has not been abused. But the courts of appeals also should not be required to remand a case for trial with the knowledge that the future course of the proceedings will be made much more burdensome, or even entirely pointless, because of an erroneous legal ruling already entered by the district court.

II. AN EXERCISE OF PENDENT APPELLATE JURISDICTION WAS FULLY APPROPRIATE IN THIS CASE.

The case at bar presents an example of the appropriate exercise of pendent appellate jurisdiction. Indeed, in the circumstances of this case, there can be little doubt that the Eleventh Circuit correctly weighed the competing costs and benefits of broadening the scope of its review to include not only the qualified individual immunity of Sheriff Morgan but also municipal liability under *Monell*.

First, the Eleventh Circuit had every reason to believe that addressing the County Commission's potential liability at this stage would be beneficial. Whether the County Commission could be held liable for Sheriff Morgan's conduct was a pure question of law that had already been presented to the district court. *Both* parties supported the court's decision to address this question once the case had been brought to the appellate level. The question was substantially related to the qualified-immunity issue already before the court.[8] Most importantly, in the circumstances of this case, if the County Commission was correct in its arguments, "reviewing the district court's order would put an end to the entire case against the County." Pet. App. 31a. Thus, there was a potential to simplify the remand proceedings substantially, while shielding a governmental body from the rigors of a pointless but complex trial.

There was also no reason to believe that deciding this additional issue would be harmful in any way. There was no danger of disrupting pending district court proceedings, because the trial of the case against the Chambers County Commission clearly was not going to proceed prior to the disposition of the individual defendants' appeal on their qualified immunity claims.[9] Nor was there any basis for

[8] A first step, in any analysis of qualified immunity in the Eleventh Circuit, is a determination whether the defendant " 'was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.' " *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988) (quoting *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983)). *See* Pet. App. 10a (noting this element of the test). That determination, of course, is closely related to the question whether the individual defendant has sufficient authority to make "policy" for a given municipality.

[9] It would have made no sense for the district court to convene a trial against the County Commission, without the individual defendants, since the constitutionality of the Sheriff's conduct would have had to be litigated in such a trial. If claims against individuals and municipalities are not going to be tried together, it makes far more sense to try the former first, proceeding to a trial against the municipality only if the jury determines that the individuals acted unconstitutionally. *See, e.g., City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

concern that the qualified-immunity appeals were pretexts for bringing the County Commission's claim to the appellate level. To the contrary, the individual defendants partially *prevailed* in their arguments concerning qualified immunity.[10]

Finally, the Eleventh Circuit was very attentive to the need for an adequate record on which to resolve the pendent issue. It chose to reach the question of the authority of an Alabama sheriff to set policy for a county, precisely because there was an adequate record for resolving that question. But it simultaneously refused to entertain the City of Wadley's appeal, because there was an inadequate record for deciding whether, in "custom and practice," the city's police chief exercised policymaking authority. Pet. App. 37a.

In these circumstances, the Eleventh Circuit's careful exercise of discretion to hear the Chambers County Commission's appeal was perfectly appropriate.

III. IN THE ALTERNATIVE, THE COURT OF APPEALS HAD JURISDICTION UNDER THE COLLATERAL-ORDER DOCTRINE TO DETERMINE WHETHER THE COUNTY COMMISSION COULD BE HELD LIABLE FOR THE ACTIONS OF A STATE OFFICIAL.

This Court has not considered whether denial of a municipality's motion to dismiss a section 1983 claim—for failure to satisfy the *Monell* "policy or custom" standard—is an appealable order under the collateral-order

[10] The Eleventh Circuit ruled that the district court had erred in refusing to find that the individual defendants were immune from claims under the Due Process Clause. Pet. App. 25a-27a. On rehearing, the court held that the district court should also have entered summary judgment for Sheriff Morgan on the equal protection claim. *Id.* at 43a.

rule. The logic of this Court's previous cases, however, suggests that the Court should treat such a denial as an appealable order, at least where, as here, the motion is based entirely on a *legal* argument that a given official lacks the authority to set municipal policy through his actions.

As this Court has noted, the collateral-order doctrine is not an exception to the finality requirement of section 1291, but rather is a "practical construction" of it. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Digital Equipment Corp.*, 114 S. Ct. at 1995. To fall within the collateral-order doctrine, a district court order must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (summarizing *Cohen*). These criteria are all met where, as here, (1) plaintiffs have premised section 1983 claims against a municipality entirely on the proposition that a given official sets municipal policy through his or her actions, and (2) the district court has rejected the municipality's pretrial motion arguing that, as a matter of law, that official lacks the authority to set policy for the municipality.[11]

The key question here involves the application of the third prong of the *Cohen* test—*i.e.*, whether municipalities can claim a substantial interest in avoiding unnecessary trials in cases where *Monell* is not satisfied, and thus have a claim that would be "effectively unreviewable" in the

[11] The situation may be quite different in the much more numerous category of cases where plaintiffs allege that a municipality has adopted an illegal "policy" through a long course of customary conduct, or by ratification of a given employee's actions. In such cases, there are likely to be subsidiary factual issues that need to be resolved and render an interlocutory appeal undesirable. Here, by contrast, the issue appealed was a pure question of law concerning a given official's authority to set municipal policy.

absence of an interlocutory appeal in circumstances like those presented here. In addressing this question, it is noteworthy that the Court has already authorized collateral-order appeals with respect to the other two major legal defenses available under section 1983. Individual defendants sued in their individual capacity may, as in the present case, appeal the denial of a motion to dismiss premised on a claim of good-faith immunity. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). In addition, any individual or governmental body sued in its official capacity may appeal the denial of a motion to dismiss premised on a claim that it is an arm of the state, and hence not a "person" within the meaning of section 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Such a claim is immediately appealable because it can be characterized as an assertion of Eleventh Amendment immunity. *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993) ("*PRASA*"). Thus, at this point, the only category of defendants who do not have a recognized right to an interlocutory appeal from the rejection of a legal defense in a section 1983 action is municipal defendants sued under *Monell*.[12]

There are strong reasons, however, for treating a municipality's *Monell* defense in the same way that the Court has treated the defenses available to individual and state defendants. To begin with, the Court has already emphasized that the "identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989) (emphasis in original). In so doing, the Court has impliedly recognized a municipality's interest in hav-

[12] Municipalities are, of course, not shielded by the Eleventh Amendment immunity that protects the states. Nor do they have qualified "good faith" immunity. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

ing this legal issue resolved not only correctly but in advance of the trial on the merits.

Moreover, much of the reasoning offered to justify immediate appeals in *Mitchell* and *PRASA* is equally applicable when a municipality is sued for damages. Thus, in *Mitchell*, the Court made the practical judgment that the underlying purposes of qualified immunity—avoiding "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service," 472 U.S. at 526—would be better served if individual defendants had the right to appellate consideration of their immunity claims prior to trial. In *PRASA*, the Court raised similar practical concerns, 113 S. Ct. at 688 ("the value to the States of their Eleventh Amendment immunity . . . is for the most part lost as litigation proceeds past motion practice"), and went on to give greater emphasis to "the importance of ensuring that the States' dignitary interests [are] fully vindicated," *id.* at 689.

Here, we are dealing with a determination by Congress, based on its understanding of underlying constitutional constraints, that municipalities should only be sued under section 1983 for illegal policies that *they* have deliberately adopted. *Monell*, *supra*. In a case where a municipality has a valid defense under that standard, but the district court has erroneously rejected that defense, deferral of an appeal until after trial will often have serious practical consequences and, more fundamentally, will always mean that the will of Congress is not fully vindicated. After all, at that point, section 1983 will have become a vehicle for forcing municipal governments to go through the rigors of trial even in cases where Congress determined that it would be improper for them to have to answer to the federal courts.

The only apparent argument for distinguishing between the good-faith and Eleventh Amendment defenses, on the one hand, and a *Monell* defense, on the other, is that the

former have been characterized as "immunities." But, for the reasons already suggested, this is ultimately an arbitrary distinction. The *Monell* "policy or custom" limitation on municipal liability, while not denominated a form of "immunity," was created by Congress in 1871 expressly because Congress believed that it would have been unconstitutional to overstep that bound and impose *respondeat superior* liability on municipalities. In this sense, it is very comparable to the immunity of "arms of the state" and the qualified immunity enjoyed by individual defendants, which are equally based on decisions by *Congress*[13] about the appropriate limits of section 1983 liability for particular categories of defendants. *Cf. Digital Equipment Corp.*, 114 S. Ct. at 2001-02 (drawing a distinction, for purposes of the collateral-order rule, between privately created rights and immunities that have a constitutional or statutory basis).[14] And, as with these other limitations on the scope of section 1983, much of the benefit of Congress's limitation is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 527. For these reasons, the Court should hold that the third prong of the *Cohen* test is satisfied in this instance.

The first two prongs of the test are also satisfied here. First, when the County Commission filed its appeal, the

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[13] Although the Eleventh Amendment is, of course, a constitutional provision, Congress has the power to limit its application. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14 (1989) (plurality opinion of Brennan, J.); *id.* at 57 (White, J., concurring in the judgment). Thus, the immunity of state entities from liability under section 1983 is ultimately a choice made by Congress.

[14] The essentially arbitrary nature of the label "immunity" is further illustrated by *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), where the Court held that Congress, in enacting section 1983, had created an "immunity" for municipalities from punitive damages. There is no apparent reason why this aspect of the scope of municipal liability under section 1983 should constitute an immunity, while the "policy and custom" rule does not.

district court had "conclusively" held that respondent would be forced to go to trial before it could hope to prevail on its *Monell* defense. In its order on reconsideration, the court had indicated that it was not going to resolve the question whether Sheriff Morgan is a county policymaker at the summary judgment stage but would "make a ruling as a matter of law on that issue before the case goes to the jury." Pet. App. 72a. Assuming that *Monell* does create a right to avoid trial in those situations where, as a matter of law, the municipal "policy or custom" requirement is not met, the district court's action meant that respondent's assertion of this right had been "conclusively" rejected.

Finally, the issue that respondent sought to raise was certainly an "important issue completely separate from the merits of the action." To begin with, it is apparent that respondent's claim was "important." Involving as it did the vindication of Congress's will with respect to the situations in which federal courts may take action against municipal governing bodies, it was inherently important. Moreover, because the particular question raised—whether an autonomous state official could make policy for a county commission—was "serious and unsettled," *Cohen*, 337 U.S. at 547, the importance of the issue was enhanced in this instance.

Respondent's claim was also entirely separate from the merits. Petitioners have never alleged that the County Commission itself has *done* anything to them. Their theory of the County Commission's liability is based entirely on certain general propositions concerning the nature of the legal relationship between counties and sheriffs in Alabama. That theory would be equally applicable in all other cases involving alleged misconduct by Alabama sheriffs, regardless of the particular "merits" of each case.

For these reasons, a municipality should be authorized to bring an interlocutory appeal from the denial of a

motion arguing that a particular official lacks the legal authority to set municipal policy.[15]

CONCLUSION

The Court should conclude that the Eleventh Circuit had valid jurisdiction to reach the County Commission's claim, and proceed to address the merits of the issues previously briefed in this Court.

Respectfully submitted,

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[15] At a minimum, even if the Court decides that a rejection of such a *Monell* defense is not an appealable collateral order, the availability of pretrial appeals to all categories of section 1983 defendants *other* than municipalities should play a role in the Court's analysis of the pendent appellate jurisdiction issue. It would be particularly anomalous to hold that municipalities not only lack a right to appeal prior to trial but must, in every case, wait behind while individual and state co-defendants pursue such appeals.